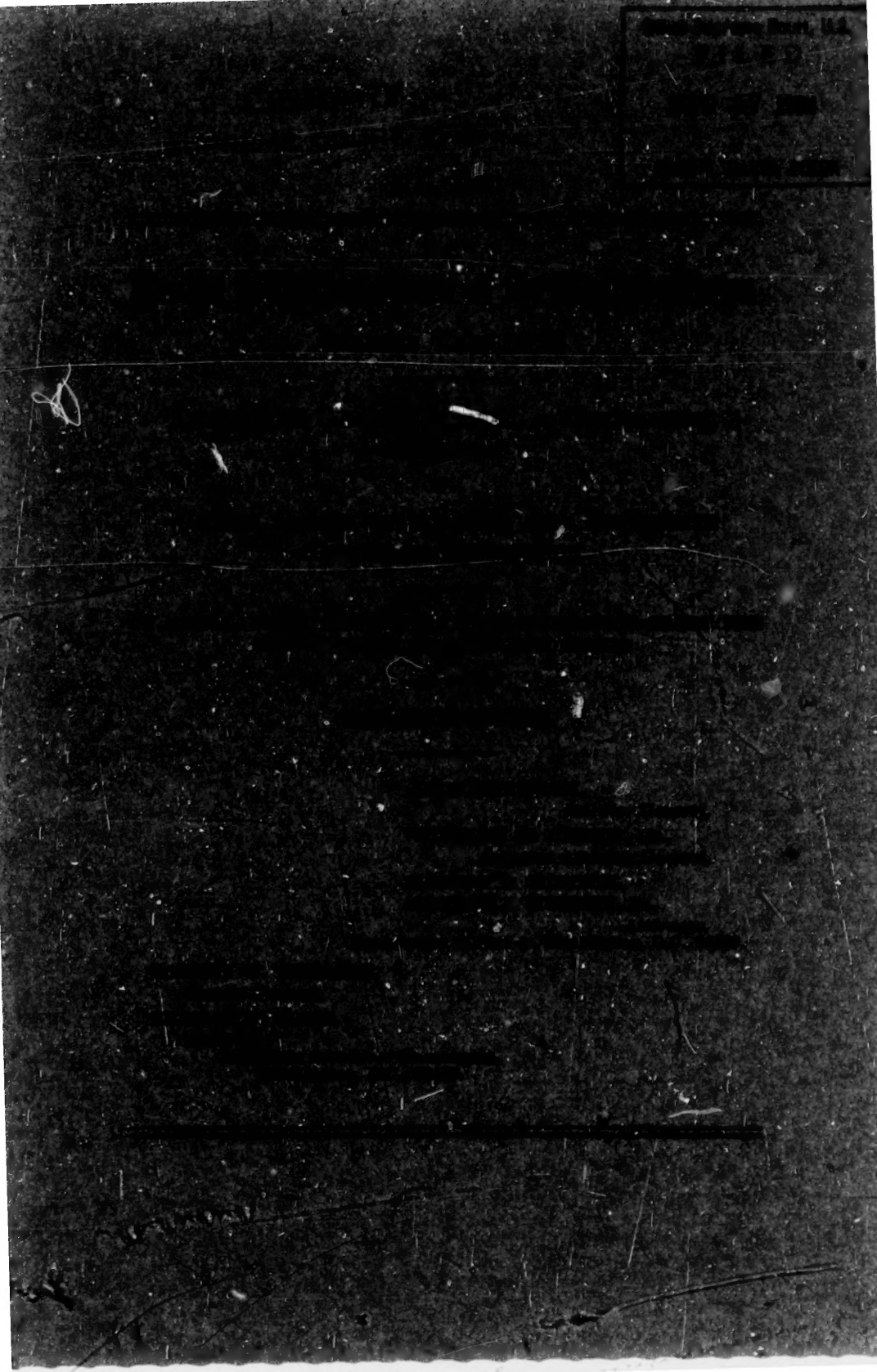

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 931

LYNCHBURG TRAFFIC BUREAU, A CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court, entered on November 21, 1963,[1] dismissing an action brought by appellant to set aside an order of the Interstate Commerce Commission which had dismissed appellant's complaint that

[1] Appellant's motion for reconsideration or rehearing was denied on December 31, 1963 (J.S. 23–24).

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the rates maintained by the respondent railroads on "fine" coal from certain Virginia and West Virginia mines to Lynchburg, Virginia, violate Sections 1, 2, 3(1) and 4 of the Interstate Commerce Act (49 U.S.C. 1, 2, 3(1) and 4) (Appendix, *infra,* pp. 10–11).

In two separate proceedings in 1943 and 1948, the Interstate Commerce Commission prescribed $2.05 and $2.55 respectively as the maximum rates on shipments of bituminous coal from mine groups in Virginia, West Virginia and Kentucky to Lynchburg and Danville, Virginia (J.S. 36). Lynchburg is 64 miles closer to the mines on the main lines of the Norfolk & Western Railway than is Danville (J.S. 34). This 50-cent differential in favor of Lynchburg was increased to 53 cents by subsequently authorized general increases (J.S. 36). In 1954, carriers serving destinations in North and South Carolina determined that competition from natural gas was causing certain consumers of the coal which they carried, particularly electric-utility and other industries, to change their fuel. The carriers decided that a reduction in rates for shipments of fine coal [2] was necessary if they were to retain these customers. They thereupon reduced the rates on fine coal by 35 cents, and, to avoid violations of Section 4,[3] established this reduced rate as

[2] Fine coal, described as "coal which will pass through a bar screen not exceeding one and one-half inches between bars, or its equivalent a two-inch mesh or two-inch round perforation" (J.S. 33), is normally used by industrial consumers, which do not, in contrast, use lump coal. Rates on lump coal are not in issue here.

[3] Section 4, 49 U.S.C. 4 (App., *infra*, p. 11), forbids a carrier to charge or receive greater compensation for a shorter than a longer haul.

the maximum on intermediate points, including Danville (J.S. 40). The rate on fine coal to Danville was then $3.68, and to Lynchburg $3.45, a differential of 23 cents in favor of Lynchburg (J.S. 41).

By subsequent rate changes, including both authorized general increases and reductions necessitated in part by competition among competing rail carriers, this differential in favor of Lynchburg was eliminated and the identical rate of $3.60 was established on fine coal to each locality (J.S. 41–42).

On July 21, 1961, appellant, the Lynchburg Traffic Bureau, filed a complaint with the Commission alleging that this identity of rates on fine coal to localities at different distances from the origin point was (a) unjust and unreasonable, in violation of Section 1 of the Act; (b) unjustly discriminatory, in violation of Section 2; (c) unduly preferential or prejudicial, in violation of Section 3; and (d) in violation of Section 4 (J.S. 33). On May 11, 1962, the Examiner recommended dismissal of the complaint. The Commission, on October 29, 1962, by its Rates and Practices Review Board, entered a report and order (J.S. 31–47) adopting the Examiner's recommendation.[4]

In its report, the Commission considered and rejected each of appellant's contentions. It found that the rate on fine coal from the Virginia and West Virginia mines to Danville, although less than the author-

[4] Appellant's petition for reopening and reconsideration was denied by the Commission, Division 2 acting as an Appellate Division, by order of January 29, 1963. Appellant's petition for reconsideration by the entire Commission was returned as untimely under Rule 1.101 of the Commission's General Rules of Practice.

ized maximum, was not shown to be unjust and unreasonable in violation of Section 1 of the Act (App., *infra*, p. 10). It noted that the railroads were authorized to publish rates less than the established maximum as long as the rates were reasonable, and that the reduction in rates here had been caused, and was justified, by competition between fine coal and natural gas at Danville. It rejected appellant's contention that the Commission had previously determined that a differential of 50 cents in favor of Lynchburg must exist on all bituminous coal rates from the origin mines to Lynchburg and Danville in order for such rates to be reasonable (J.S. 43–44).

The Commission also rejected appellant's contention that identical rates for different distances violated the prohibition of Section 2 of the Act against charging different rates for performing "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions" (App., *infra*, p. 10). It reasoned that "[t]here can be no unjust discrimination within the meaning of section 2 of the Act when the compared transportation is not from and to the same points," and concluded that "[a]ll receivers of fine coal at Lynchburg are accorded the same rate from the same origins and for the same service, and consequently no discrimination in violation of section 2 is shown by the evidence" (J.S. 44).

Finally, because appellant had failed to present proof of competition between consumers of fine coal at Lynchburg and at Danville, and had not shown that the lowering of the rate to Danville had operated to the

disadvantage of appellant or any receivers of fine coal at Lynchburg, the Commission found that the existence of the same rate to Danville and Lynchburg did not establish that such rates were unduly prejudicial or preferential in violation of Section 3(1) of the Act (J.S. 44–46; App., *infra*, pp. 10–11).[5]

The court below affirmed the Commission on each point (J.S. 26–31).

ARGUMENT

The decision below is clearly correct and this appeal presents no substantial question warranting plenary review by the Court. In essence, appellant's argument is that it is illegal for the railroads to lower the Danville rate on fine coal to a level which equals that applicable at Lynchburg, 64 miles closer to the mines. However, its attempts to show the illegality of such rates under various sections of the Interstate Commerce Act are unavailing.

Appellant first alleges that such rates violate Section 1(5) because, it asserts, the Commission has, in

[5] The allegation of a violation of Section 4 of the Act (the "long and short haul" section) was dismissed by the Commission since the rates were identical at each point and that section only prohibits charging greater rates for a lesser distance, not the same rate for different distances (J.S. 46). At the time the complaint was filed the existing rate on fine coal to Lynchburg had in fact been higher than to Danville (J.S. 42–43). The district court noted that with the equalization of the rates appellant "apparently abandoned" its contentions with respect to Section 4 (J.S. 30; see also J.S. 43).

proceedings dating back to 1900, prescribed lower rates on bituminous coal to Lynchburg than Danville. From that claimed history, appellant argues that the Commission has determined that there must be a fixed rate relationship on all coal favoring Lynchburg by at least 50 cents for such rates to be just and reasonable. However, the Commission found (J.S. 43–44), and the court below affirmed (J.S. 28), that no such relationship had ever been established and that the numerous proceedings of the Commission cited by appellant merely fixed the maximum rates on all bituminous coal for each city. In the absence of any binding relationship, the railroads are free to charge a reasonable rate less than the maximum prescribed (*United States* v. *Chicago, M., St. P. & P.R. Co.*, 294 U.S. 499, 506; *Baltimore & Ohio R. Co.* v. *United States*, 298 U.S. 349, 358). The Commission found (J.S. 44, 46) that the lesser rates at issue here are not unjust and unreasonable, and this determination is properly one of fact to be made by that body (*Pennsylvania R. Co.* v. *International Coal Co.*, 230 U.S. 184, 196; *Lynchburg Traffic Bureau* v. *United States*, 84 F. Supp. 1012, 1016–1017 (W.D. Va.), affirmed, 338 U.S. 864).

The fact that Danville is farther from the mines than Lynchburg, yet enjoys the same rate, is not alone determinative of the reasonableness of the Lynchburg rates, for distance is but one factor in ratemaking. *Ayrshire Corp.* v. *United States*, 335 U.S. 573, 588, 593; *Louisville & N.R.R.* v. *United States*, 238 U.S. 1, 11, 12; *Lynchburg Traffic Bureau* v. *United States*,

supra. Indeed, the Commission found that the railroads were justified in lowering their rate for shipment of fine coal to Danville below the maximum because of the competition at Danville between such coal and natural gas, a competition which did not exist at Lynchburg (J.S. 42–43). The need to adjust rates to meet competition has long been a recognized factor in determining the reasonableness of rates under Section 1(5). *Chicago, M., St. P. & P.R. Co.* v. *United States*, 8 F. Supp. 970, 974 (N.D. Ill.), affirmed *sub nom. United States* v. *Chicago, M., St. P. & P.R. Co., supra*. Thus, the Commission and the court below properly concluded that appellant failed to show in what manner the rate on fine coal at Danville and Lynchburg was unjust or unreasonable in violation of Section 1(5).

Appellant's assertion of unjust discrimination against Lynchburg under Section 2 by reason of the identical rates to Danville is likewise unavailing. Section 2 prohibits discrimination in rates between shippers or receivers of similar commodities for the same transportation service between the same points. Appellant has presented no evidence that the carriers have subjected any shipper or receiver of fine coal either at Lynchburg or at Danville to charges which differ from those paid by other shippers or receivers for the same haul. Such evidence is a prerequisite to a finding of a violation of Section 2 (*Wight* v. *United States*, 167 U.S. 512, 518; *Ayrshire Corp.* v. *United States*, 335 U.S. 573, 584). Complaints concerning the relationship between rates for services to different localities are not cognizable under that sec-

tion (*Interstate Commerce Commission* v. *Western & A.R. Co.*, 88 Fed. 186, 197 (C.C. N.D. Ga.), affirmed, 93 Fed. 83 (C.A. 5), modified on other grounds, 181 U.S. 29).

Finally, appellant claims that the rate on fine coal at Lynchburg is unduly prejudicial to that city, in violation of Section 3(1), because it is the same as that charged for the longer haul to Danville. However, a mere difference or identity in rates does not, without more, amount to an unjust discrimination. *Board of Trade* v. *United States*, 314 U.S. 534, 546. It must be shown that any such discrimination, preference or prejudice is unjust or undue. *United States* v. *Illinois C.R. Co.*, 263 U.S. 515, 524; *Manufacturers R. Co.* v. *United States*, 246 U.S. 457, 481; *Texas, etc. R. Co.* v. *Interstate Commerce Commission*, 162 U.S. 197, 219–220. There must be evidence of competition between consumers of fine coal at Lynchburg and consumers of like coal at Danville, or between the localities themselves, as well as a showing that the disparity operates to the disadvantage of the complainant.[6] *Interstate Commerce Commission* v. *Baltimore & O.R. Co.*, 43 Fed. 37, 47 (C.C. S.D. Ohio), affirmed, 145 U.S. 263, 283–284; *Atchison, T. & S.F.R. Co.* v. *United States*, 218 F. Supp. 359, 369 (N.D. Ill.). Appellant failed to introduce any such evidence and the compe-

[6] Appellant supports its argument that there is actual competition between Lynchburg and Danville by citation of the Commission's decision in 1900 in *City of Danville* v. *Southern Railway*, 8 I.C.C. 409 (J.S. 9–10). Whatever that decision may indicate as to the existence of competition between the cities in 1900, it does not constitute evidence of that fact as of the date of appellant's complaint.

tition between fine coal and natural gas at Danville,[*] was held by the Commission to be justification for the lowering of the rate for fine coal there (J.S. 39, 40, 46).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be affirmed.

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APRIL 1964.

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[*] This competition did not exist at Lynchburg, since that locality does not have the same gas supply available to it as does Danville; the Federal Power Commission denied the local gas company's request for a greater supply of natural gas. See *Lynchburg Gas Company* v. *Federal Power Commission*, 275 F. 2d 847 (C.A. 3).

Appellant argues that the record is "absolutely void of any evidence" of competition between fine coal and natural gas at Danville (J.S. 13–15). This contention is refuted by the findings of both the Commission (J.S. 46) and the court (J.S. 30). Thus, the Commission stated, "the defendants have shown, without contradiction, that the present rates on fine coal to Danville are compelled by gas competition * * *."

APPENDIX

The pertinent provisions of the Interstate Commerce Act, 49 U.S.C. 1 *et seq.*, are as follows:

1. Section 1(5):

All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

2. Section 2:

If any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

3. Section 3(1):

It shall be unlawful for any common carrier subject to the provisions of this part to

make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: Provided, however, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

4. Section 4(1):

It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance * * *.

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